BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-8173
File: 20-205225 Reg: 03054712

CIRCLE K STORES, INC. dba Circle K Stores #8678
28005 Seco Canyon Road, Saugus, CA 91390,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: August 5, 2004
Los Angeles, CA

ISSUED SEPTEMBER 17, 2004

Circle K Stores, Inc., doing business as Circle K Stores #8678 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerks, Rudy Monterroso and Brian McCullough, having sold beer and a malt beverage to Mark Penny, a non-decoy minor, then nineteen years of age, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated July 24, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 8, 1988. Thereafter, the Department instituted an accusation against appellant charging an unlawful sale of alcoholic beverages to a minor.

An administrative hearing was held on June 30, 2003, at which time oral and documentary evidence was received. At that hearing, testimony in support of the accusation was presented by Mark Penny, the minor, and by Charlotte Clark and Victoria Wood, Department investigators. James Dao, appellant's District manager, testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, rejecting appellant's claim that the store did not carry the items alleged to have been purchased by Penny.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department did not sustain its burden of proof; and (2) the penalty must be reversed because it was imposed by an administrative law judge who was assigned pursuant to an unlawful regulation.

DISCUSSION

I

Appellant contends that the Department did not sustain its burden of proof. It asserts that the minor "lied about every substantive issue" on direct and cross-examination, and that at least one of the two alcoholic beverages claimed to have been purchased was not sold at that store location.

Appellant's challenge to the decision is, in substance, a claim that the decision is

not supported by substantial evidence. The claim lacks merit.

Investigator Clark testified that her attention was drawn to the minor by his youthful appearance. She followed him into the store, and saw him approach the counter with a bottle of Corona beer and a bottle of Smirnoff Ice. The minor paid for the beer and left the store. Clark followed him out, stopped him, and asked him for identification. Penny stated "I'm busted," and produced identification showing him to be 19 years of age.

Appellant contends in its brief that Penny's relationship to McCullough, the clerk who authorized the sale, was crucial to the defense, and that Penny lied about its nature, or even its existence. Further, according to appellant, the decision fails to deal adequately with Penny's lack of credibility.

We are not told what it is about the purported relationship between Penny and McCullough that makes it crucial to the defense. McCullough did not testify, and while the evidence does suggest that they may have known each other from their employment with appellant, that without more cannot excuse the unlawful sale of an alcoholic beverage to a minor. As the ALJ noted, appellant "has failed to fill in the blanks to support its position that the violation occurred as a result of a deception practiced by the minor." (Finding of Fact 5.)

Appellant also contends that Penny could not have purchased the Smirnoff Triple Black Ice at its store because its store did not carry the size allegedly seized by the Department. The ALJ rejected this contention, choosing to believe the testimony of investigator Clark over that of appellant's District Manager. We have reviewed the record, including the testimony regarding the seizure of the products from Penny and

the identifying marks placed on them by investigator Clark, and are not inclined to question the ALJ's findings.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in this case, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].)

II

Appellant contends that the Department's Policy on Assignment of Administrative Law Judges (Policy) is violative of Government Code sections 11340.5, subdivision (a), and 11425.50, subdivision (e), because it was not first adopted as a regulation and filed with the Secretary of State. Appellant also contends that the 15-day suspension is

improper because it is a penalty imposed by an administrative law judge (ALJ) appointed pursuant to that Policy. Finally, appellant contends that the Policy fails to adequately specify how the Department decides whom to add and whom to exclude from the lists of retired annuitants, or how a retired annuitant may be removed from the list. Appellant argues that it may reasonably be assumed the Department has chosen to add to its list those retired annuitant ALJ's who, in the system in place before mid-2002, had tended to favor the Department in their rulings.

Government Code section 11340.5 provides:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Government Code section 11425.50, subdivision (e), provides:

> A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340.)

The Policy, of which we take official notice, outlines the procedure to be used in appointing and assigning retired annuitant ALJ's, and "is intended to comply with the mandates of *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 and insure that the appointment of retired annuitant administrative law judges shall be conducted in a manner that avoids both the appearance and actuality of impropriety or financial incentive to rule in favor of the Department in any given case." (Policy, introduction, 2d ¶.)

The Policy provides that assignments are to made in the following order of priority: first, full-time Department ALJ's; second, retired annuitant ALJ's; and third, ALJ's from the Office of Administrative Hearings (OAH). (OAH is an independent agency that provides ALJ's for state administrative hearings.) "Payment for duties performed, continued or future appointment, or termination of any relationship shall not be based upon any recommendation contained within Proposed Decisions prepared by the retired annuitant administrative law judge but shall be based upon such factors as the needs of the Department, timeliness and professional standards." (Policy, part 3, 2d ¶.)

The Department will maintain separate lists of "eligible retired annuitant ALJ's" for northern and southern California. Assignments will be offered to the first retired annuitant on the particular list, and progress through the list in order.

In *7-Eleven, Inc./Phatipat (2003) AB-7875*, the Board was concerned with "whether the Department's method of employing retired annuitants on an hourly basis has been done 'in a way that does not create the risk that favorable decisions will be rewarded with future remunerative work,' as *Haas* would seem to require."[2] The court in *Haas*, on page 1037, footnote 22, suggested "some procedures that might suffice to eliminate the risk of bias." One of the ways the court mentioned to eliminate the risk was by "appoint[ing] a panel of attorneys to hear cases under a preestablished system

[2]The court said in *Haas*: "To satisfy due process, all a county need do is exercise whatever authority the statute confers in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the county." (*Haas*, *supra*, 27 Cal.4th at p. 1037.)

of rotation." This is exactly what the Department Policy provides.

Appellant argues that the Policy does not address the issue of the pecuniary interest of retired annuitant ALJ's in future employment by the Department, since, it asserts, placement on the list is wholly within the discretion of the Department. While placement and retention on the list would be at the discretion of the Department, the method described in footnote 22 of *Haas* does not appear to contemplate any more stringent requirements to comply with due process.

Appellant points out that retention of a retired annuitant ALJ on the Department's list "is not assured by any status such as a civil service status." A lack of civil service protections does not appear to be a disqualifying factor, however, because the positions approved by the Supreme Court in *Haas* would almost certainly be "at will" positions: that is the nature of ad hoc employment.

With the addition of the Department's Policy for assigning retired annuitant ALJ's to already existing protections of the Administrative Procedure Act, under which all the ALJ's must work, and the separation of the Department's adjudicatory function from the investigatory and enforcement functions by the establishment of the AHO, we believe that the financial interest of the retired annuitant ALJ's in future employment by the Department is sufficiently attenuated to meet the due process concerns expressed in *Haas*. Absent some evidence to the contrary, we are not willing to assume that the Department will not comply with its Policy in good faith. This being so, we do not believe the Policy needs to address the finer points of retired annuitant employment.

Against this background, appellant's contention that the Policy is an unlawful

underground rule can be quickly disposed of. Government Code section 11340.9, part of the same chapter as the Government Code sections relied upon by appellant, provides that the chapter "does not apply to any of the following: ... (d) a regulation that relates only to the internal management of the state agency." It seems clear that the policy, one which clearly relates in all respects to the employment and assignment of ALJ personnel, is one of internal management, not subject to the strictures of Government Code section 11340.5, subdivision (a).

It also follows that a penalty imposed by an ALJ assigned pursuant to that Policy is not tainted by that fact alone.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.